

Wednesday, 20 November 1946

INTERNATIONAL MILITARY TRIBUNAL  
FOR THE FAR EAST  
Chambers of the Tribunal  
War Ministry Building  
Tokyo, Japan

PROCEEDING IN CHAMBERS

On

Paper No. 564 - Application of the Prosecution for leave to present the evidence in chief of Major K. A. deWeerd, a witness on behalf of the Prosecution, in the form of a prepared statement instead of by oral examination.

Paper No. 570 - Application by the Prosecution for an order that the Tribunal take judicial notice of a certain event.

Paper No. 547 of NAGANO, Osami; and OKA, Takazumi.

Paper No. 554 of SATO, Kenryo.

Paper No. 556 of OKAWA, Shumei.

Paper No. 558 & 560 of OSHIMA, Hiroshi.

Before:

HON. SIR WILLIAM WEBB,  
President of the Tribunal and  
Member from the Commonwealth  
of Australia.

Reported by:

SAM GOLDBERG  
Court Reporter, IMTAFE

Appearances:

FOR THE PROSECUTION SECTION:

MR. EUGENE D. WILLIAMS

MR. W. G. F. BORGERHOFF MULDER, Justice,  
Associate Counsel, acting on behalf  
of the Kingdom of the Netherlands.

MR. G. OSMOND HYDE

FOR THE DEFENSE SECTION:

MR. JOHN G. BRANNON, Counsel for the  
Accused MAGANO, Osami

MR. OWEN CUNNINGHAM, Counsel for the  
Accused OSHIMA, Hiroshi

MR. A. V. BROOKS, Counsel for the  
Accused OKAWA, Shumei

MR. JAMES N. FREEMAN, Counsel for the  
Accused SATO, Kenryo

MR. WILLIAM LOGAN, Counsel for the  
Accused KIDO, Koichi

MR. OHARA, Shinichi, Counsel for the  
Accused OKAWA, Shumei

MR. KUSANO, Hyoichiro, Counsel for the  
Accused SATO, Kenryo

MR. MICHAEL LEVIN, Counsel for the  
Accused SUZUKI, Teiichi

MR. FUJISAWA

MR. USHIBA

MR. SHIMANO, Auchi

FOR THE OFFICE OF THE GENERAL SECRETARY,  
IMTFC:

MR. CHARLES A. MANTZ, Clerk of the Court

JUDGE E. H. DELL, Legal Adviser

The proceeding was begun at 0900.

Paper  
# 564

THE PRESIDENT: Paper #564, an application by the Chief of Counsel to have the evidence of Major deWeerd presented in the form of a statement--written statement.

Who appears for the Chief of Counsel?

Mr. Williams.

MR. WILLIAMS: Justice Borgerhoff Mulder is handling this matter.

THE PRESIDENT: General Borgerhoff Mulder for the applicant.

Well, I have read the application. His evidence will be something like that of Colonel Wild, will it not?

MR. JUSTICE BORGERHOFF MULDER: Yes.

THE PRESIDENT: Who is examined orally?

MR. JUSTICE BORGERHOFF MULDER: It all affects the occupation of the Netherlands East Indies.

THE PRESIDENT: You say he speaks English with difficulty?

MR. JUSTICE BORGERHOFF MULDER: Yes, that is right.

THE PRESIDENT: And it may not be easy to understand him, and he may take longer on that account; whereas, if he reads his evidence, he will be able to

get through quickly.

MR. JUSTICE BORGERHOFF MULDER: Yes, sir.

It will save a lot of time if he is allowed to read the statement.

THE PRESIDENT: What do the defense say?

MR. LOGAN: If the Tribunal please, we have not seen this affidavit. We do not know what is in it. I think we should be given a copy of the affidavit and let us have about a week or some time like that to look it over.

MR. WILLIAMS: The witness will be on before a week has expired. In all probability we will have a copy of the affidavit ready today, I have been informed. My thought is, if the defendants are served with a copy of the affidavit today, it gives them five or six or seven days in which to study in advance of the witness taking the witness stand.

THE PRESIDENT: What I said yesterday from the Bench applies generally. All of the Members are of the opinion that the defense are not prejudiced, but advantaged, in getting the statement of the witness so long in advance.

MR. LOGAN: Well, if your Honor please, there are two sides to that question. We certainly admit that it is of advantage to us to have the statement ahead of time; but, on the other hand, it must be considered

that these statements which some of these witnesses are presenting, they are replete with conclusions, and the defense have no means of telling which of the conclusions the Court is disregarding.

Now I have not seen this affidavit. I do not know if it has any conclusions in it; but if it is anything like the affidavit of Liebert or anything like the affidavit of Ballantine, we are at a loss. Furthermore, we are cut off from cross-examination on some of those conclusions in there because the Court rightly says that they do not take cognizance of the conclusions; but we do not know which conclusions the Court may consider and which they do not.

THE PRESIDENT: I tell you that we not merely disregard these conclusions, but we resent them. My colleagues have expressed the bitterest resentment against this attempt to tell the Court what their decision ought to be.

MR. LOGAN: That is what I say. If we had the affidavit ahead of time, the same way as we did with Admiral Richardson, we could look at it and, perhaps, we could come into Chambers here and have those conclusions stricken out.

THE PRESIDENT: If any witness, in drawing conclusions, thinks he is going to assist us or

influence us, he is grossly mistaken. There may be a tendency in some cases to throw that evidence out completely.

MR. WILLIAMS: Sir William, may I suggest this? I have gone over the substance of the matter to be covered by Major deWeerd's testimony. It is not of a character like either Liebert or Ballantine where he undertakes to testify like an expert. It is the testimony of a man who has made an investigation and is stating facts and not conclusions, in the first place.

In the second place, I think his position, except for the fact he has some familiarity with the English language, is comparable to that of any Chinese or Japanese witness. In other words, he would be terrifically handicapped if he were compelled, and the Court would spend possibly weeks of time, if he were compelled to cover all of his testimony by means of translation into Dutch and then translation into English and Japanese. It is going to take enough time and will be sufficiently drawn out to handle his cross-examination in that way; but if we add to that the handling of his direct examination, it just simply unnecessarily lengthens the time of trial without any good being accomplished.

THE PRESIDENT: Of course the Charter does

require us in effect to admit the reports of investigators, and such reports sometimes do contain conclusions; but we have been asked to accept as conclusions matters which are perilously close to issues, if they are not issues really.

MR. WILLIAMS: That is not the situation that would apply to this particular instance that we are talking about now, whatever may be true of other instances.

MR. LOGAN: Well, if your Honor please, may I make a suggestion that if the prosecution would let us have a copy of this statement today, then we will adjourn this motion to tomorrow morning to give us an opportunity to look at it.

THE PRESIDENT: You can rest assured that this Court will not adopt any conclusion except from an expert in a matter on which he can give expert testimony, and so far we have had very little of that. We may have that when Admiral Richardson comes. I do not know. Probably we will.

Well, I will adjourn this matter until tomorrow morning.

MR. WILLIAMS: There is this suggestion I may make in connection with that, if the Court please. If the defense are to be given the advantage of examining this statement at this time, and then should

make strenuous objection, and the Court should uphold them from use of the statement, they would have all of the advantages of having our statement in advance, and we would have all of the disadvantage by having to cover the matter by long drawn-out oral examination.

THE PRESIDENT: Well, the trial is taking far too long as it is.

MR. WILLIAMS: I know it is.

THE PRESIDENT: There are many features which give us grave concern, and we are determined to shorten it to the best of our ability. None of us have any time to spare in Tokyo. They are all busily occupied elsewhere, or should be.

Well, you want until tomorrow morning to consider that application. I will adjourn it until nine o'clock tomorrow morning.

MR. LOGAN: We will get a copy of it today?

MR. JUSTICE BORGERHOFF MULDER: Yes.

Paper  
# 570

THE PRESIDENT: This is paper #570. It is an application by the prosecution to order judicial notice of a certain event; that is, the Government of the Kingdom of the Netherlands declares a state of war to exist between the Kingdom of the Netherlands and the Japanese Empire on the 8th of December, 1941. I suppose I could make that order -- a declaration of war by a nation.

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MR. LOGAN: With this exception, your Honor.  
I think there is some question as to whether the exact date the Government of Japan received notice of that -- I believe it was a few days later.

THE PRESIDENT: Well, they declared it on that day.

MR. LOGAN: I understand they declared it on that day.

THE PRESIDENT: The application is granted.

This is paper #547.

CLERK OF THE COURT: If the Court please, those are the only matters that involve the prosecution. The balance involve the defense solely.

MR. WILLIAMS: We are going to withdraw as quietly as possible.

(Whereupon, the members of the prosecution staff withdrew from the proceeding.)

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